Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 87-1150

In the Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WM. BRADFORD REYNOLDS
Assistant Attorney General
DAVID K. FLYNN
ROBERT J. DELAHUNTY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

QUESTION PRESENTED

Whether the hiring portions of the District of Columbia Fire Department's now-superseded affirmative action plan, which created a racial quota for selecting entry-level firefighters, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Bishopp v. *District of Columbia*, 788 F.2d 781 (D.C. Cir. 1986)	15
Connecticut v. *Teal*, 457 U.S. 440 (1982)	14, 15
Dougherty v. *Barry*, 607 F. Supp. 1271 (D.D.C. 1985)	15
Firefighters Local No. 1784 v. *Stotts*, 467 U.S. 561 (1984)	16
Fullilove v. *Klutznick*, 448 U.S. 448 (1980)	14
Johnson v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987)	9, 10, 13, 14, 15
Local 28, Sheet Metal Workers' Int'l Ass'n v. *EEOC*, No. 84-1656 (July 2, 1986)	14
McCormick v. *District of Columbia*, 554 F. Supp. 640 (D.D.C. 1982)	15
Steelworkers v. *Weber*, 443 U.S. 193 (1979)	7, 10, 13
Stone v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972)	11
United States v. *County of Fairfax*, 629 F.2d 932 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981)	12
United States v. *Town of Cicero*, 786 F.2d 331 (7th Cir. 1986)	11
University of California Regents v. *Bakke*, 438 U.S. 265 (1978)	13-14
Washington v. *Davis*, 426 U.S. 229 (1976)	3

Constitution, statutes and regulation:

U.S. Const. Amend. V (Due Process Clause)	5, 8
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	5

Statutes and regulation—Continued: Page

D.C. Code Ann. (1987):
§1-507 8
§§ 1-507 to 1-514 4
§ 1-608.1(e)(1) 7
29 C.F.R. 1607.4 (D) 4

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1150

MARION S. BARRY, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 813 F.2d 412. A subsequent opinion of the court of appeals denying a petition for rehearing (Pet. App. 79a-123a) is reported at 826 F.2d 73. The order of the court of appeals granting rehearing en banc (Pet. App. 167a-168a) is reported at 833 F.2d 367; the opinion and order of the court of appeals vacating the order in which rehearing en banc was granted (Supp. Pet. App. 1a-3a) is unreported. The opinion of the district court (Pet. App. 124a-156a) is reported at 606 F. Supp. 1082. The opinion of the district court granting a motion for a stay pending appeal (Pet. App. 159a-163a) is unreported.

JURISDICTION

The judgment of the court of appeals was initially entered on February 27, 1987. A timely petition for rehearing was denied on August 14, 1987 (Pet. App. 166a). On October 26, 1987, the Chief Justice extended the time

for filing a petition for a writ of certiorari to and including January 11, 1988 (Pet. App. 169a). On November 20, 1987, the court of appeals granted a suggestion for rehearing en banc (Pet. App. 167a-168a). On January 11, 1988, petitioners filed both a petition for a writ of certiorari and a motion that the Court defer consideration of the petition and grant leave for the filing of a supplemental petition in light of the en banc decision of the court of appeals. On March 4, 1988, the court of appeals vacated its earlier order granting rehearing en banc. A supplemental brief in support of the petition for a writ of certiorari was then filed on March 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In October 1980, two black firefighters of the District of Columbia's Fire Department filed complaints with the District of Columbia's Office of Human Rights (OHR) (Pet. App. 3a). The complaints alleged that, beginning in October 1979, the Fire Department had engaged in racially discriminatory acts, including the use of unvalidated tests for the hiring of entry-level firefighters (*ibid.*). In June 1981, without the benefit of an evidentiary hearing, the Director of OHR issued a "Summary Determination" in which he found that a prima facie case of discrimination existed with respect to the Fire Department's recruitment, hiring, and promotion practices (*ibid.*). In August 1981, the OHR Director ordered that 60 of the next 70 entry-level firefighter positions be filled with minorities (*ibid.*). The Fire Department, denying that it had committed any discrimination whatsoever, appealed this ruling, and an appellate officer remanded the complaints for reconsideration (*id.* at 4a).

On remand, after holding 50 days of adjudicatory hearings, throughout which the Fire Department adamantly

denied having committed any discrimination whatsoever, an OHR Hearing Examiner rejected the bulk of the complaining parties' allegations (Pet. App. 4a-8a). The Examiner found that the complainants had failed to show that the job qualifications established for entry-level firefighters were either intentionally discriminatory or had an adverse impact on blacks; and he further found that there was no evidentiary basis for the claim that the Fire Department had discriminated against blacks in recruiting or that its promotion process was infected by discrimination (Pet. App. 4a-8a & n.5). The Examiner did note that the unvalidated entry-level written examination which the Fire Department began using in November 1980 would have had an adverse effect on blacks had it been used as a rank-ordering device (*id.* at 5a). But he found that, except for a short period in early 1981, the Fire Department had used the test only as a pass-fail screening device, with the passing score set at a level one would reasonably expect to achieve by answering the questions at random (*id.* at 5a, 7a, 8a-10a).[1] Finally, the Examiner found (*id.* at 7a) that

---

[1] Prior to January 1980, the federal government was responsible for testing at the entry level of the Fire Department (Pet. App. 8a). The federal government—specifically, the Civil Service Commission and, after 1978, the Office of Personnel Management (OPM)—had relied on "Test 21," the written test that this Court in *Washington* v. *Davis*, 426 U.S. 229 (1976), found to be valid as applied to entry-level hiring in the District of Columbia's Police Department (Pet. App. 8a). At the request of the Fire Department, however, beginning in the early 1970's, the registers of those passing Test 21 were exhausted before a new examination would be administered. Thus, in order to avoid the disparate effect that Test 21 had on minority candidates, the test was essentially used as a screening device, rather than a rank-ordering device, for the hiring of entry-level firefighters (*ibid.*).

Beginning in the 1980s, when the Fire Department took over the responsibility for entry-level testing, OPM and the Fire Department jointly developed and implemented an examination that they believed

the Fire Department had failed to achieve a racial composition in its workforce corresponding to the racial composition of the adult population of the District of Columbia and, therefore, that it had failed to comply with D.C. Law 1-63 (D.C. Code Ann. §§ 1-507 to 1-514 (1987)), which mandates proportional representation of "all groups" within the District of Columbia's working age population in all employment categories.

Based on these findings, the Examiner recommended that the Fire Department validate its entry-level test; establish written procedures for investigating the background of applicants to ensure that black applicants are processed at the same rate as white applicants; exhaust the eligibility list established as a result of the examination administered in 1980, assigning to all hired from that list the same date of hire; and adopt and implement an affirmative action plan (Pet. App. 7a-8a, 10a-13a, 128a-129a). The OHR affirmed the Examiner's recommendations in all material respects and, in November 1983, issued an order to this effect (*id.* at 12a-13a). Neither the Fire Department nor the complaining parties sought review (*id.* at 13a).

2. During the course of the OHR proceedings, the Fire Department continued its aggressive recruitment of minorities (Pet. App. 13a). Thus, in 1982, 67.5% of its new hires were black; in 1983, 80.5% of its new hires were

---

would better predict job performance—the Firefighters Service Test (FST) (Pet. App. 8a). OPM and the Fire Department developed the FST in accordance with the *EEOC's Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. 1607.4(D), and thus believed that it was a valid, nondiscriminatory selection device, even if used for rank-ordering purposes (Pet. App. 8a-9a). After using the FST as a rank-ordering device for a brief period in January 1981, however, the Fire Department's experts advised it that the FST might not be valid, and the Fire Department promptly ceased using the FST as a rank-ordering device (*id.* at 9a-10a, 12a n.12).

black; and, in 1984, 78.6% of its new hires were black (*ibid.*). Nevertheless, in March 1984, because the Fire Department planned to administer its entry-level examination again, the Progressive Fire Fighters Association and four minority applicants filed suit to enforce the OHR's order and to require the Fire Department to eliminate the racial disparities that allegedly existed in the firefighter ranks (*id.* at 14a). Two months later, the district court entered a consent decree in which the Fire Department agreed to validate an entry-level test, to submit a proposed affirmative action plan to the court, and to hire from the eligibility list derived from the 1984 examination only after exhausting the eligibility list derived from the 1980 examination (*ibid.*). The consent decree made clear, however, that it was " 'neither an admission nor a finding that the [Fire Department] ha[d] violated any law or regulation regarding prohibited discrimination' " (*ibid.*).

In February 1985, the Fire Department submitted a proposed affirmative action plan to the court (Pet. App. 14a). It addressed both hiring and promotion issues (*id.* at 14a-15a). With respect to hiring, it provided, among other things, that each entering class of firefighters would be at least 60% black (*id.* at 15a n.14).

3. In March 1985, eight nonminority firefighters and their union, Local 36, International Association of Firefighters, filed suit in the district court, alleging that the promotion provisions of the plan violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Due Process Clause of the Constitution (Pet. App. 15a). Shortly thereafter, the United States filed a similar suit, challenging the hiring as well as the promotion provisions of the plan (*ibid.*). The district court consolidated the three cases (*id.* at 129a-131a).

In April 1985, on the parties' cross-motions for summary judgment, the district court sustained the hiring pro-

visions against statutory and constitutional attack and struck down the promotion provisions as violative of Title VII (Pet. App. 124a-156a). The court found (*id.* at 131a-132a, 140a-144a) that the Fire Department had been segregated in the 1950s; that some "vestiges" of this past discrimination remained; that the 60% hiring quota was "reasonable" because over 60% of the persons taking the unvalidated 1984 examination were black; and that white applicants were not " 'unnecessarily trammel[led]' " (*id.* at 143a (citation omitted)) by the quota because they had little expectation of or entitlement to a job with the Fire Department. Thus, although it was "not comfortable with [the plan's] racially based discriminations," and stated that "in this case perhaps a strength or agility test might be less objectionable," the court approved the hiring provisions of the plan (*id.* at 151a). But it found that the promotion provisions " 'unnecessarily trammel[led]' upon the rights and interests of the white firefighters, who are in line for promotions, by advancing blacks based solely on their race over more qualified and more senior white firefighters" (*id.* at 152a). Finally, by order of April 26, 1985 (*id.* at 159a-163a), it ruled that the Fire Department should be permitted to hire entry-level personnel pursuant to the plan "until or unless modified by a higher court" (*id.* at 163a).

4. On appeal by the United States,[2] a divided panel of the court of appeals reversed (Pet. App. 1a-78a). Drawing upon cases decided under both Title VII and the Constitution (*id.* at 19a-27a), the court concluded that "remediation of present discrimination (or extant results of its insidious prior operation) is the absolutely indispensable element of the legality of remedies which differentiate

---

[2] The Fire Department did not appeal the invalidation of the promotion provisions of the plan.

human beings on the basis of race" (*id.* at 27a). The court further noted (*id.* at 28a) that "the law contains yet another hurdle before a race-preference program may properly be employed: the remedy crafted to address a violation must be tailored to fit that violation." The court concluded that the Fire Department had "failed to establish the requisite predicate of discrimination and did not consider, let alone employ, alternatives to its race-preference plan" (*id.* at 3a).

With respect to the predicate of discrimination, the court found that "the racial preference plan had nothing to do with 'break[ing] down old patterns of racial segregation and hierarchy' " (Pet. App. 32a, quoting *Steelworkers* v. *Weber*, 443 U.S. 193, 201, 208 (1979)). The court reasoned (Pet. App. 34a-35a) that, since 1981, the average percentage of blacks filling entry level positions had far exceeded their proportion—29.3%—within the relevant job market, the Washington Metropolitan area,[3] and had even exceeded each year "the 74.35 black percentage in the 1980 applicant pool." "Since 1981 * * * an average of no less than 75.5 percent of those hired each year have been black" (*id.* at 33a). Even "between 1969 and 1980, an average of 41.8% of those hired by the Fire Department each year were black" (*id.* at 32a). In light of these statistics, the court concluded (*id.* at 32a-33a) that there was no basis for finding that the affirmative action plan was "designed to dismantle the structure of discrimination" (*id.* at 36a).

---

[3] Until the District of Columbia enacted a law in 1980 requiring new hires to become District residents within six months (see D.C. Code Ann. § 1-608.1(e)(1) (1987)), the Fire Department had extensively recruited firefighters from this greater metropolitan area (such that about half of its entry-level firefighters were suburbanites). Even after 1980, the Fire Department continued to hire firefighters in substantial numbers from the surrounding suburbs. See Pet. App. 34a, 90a n.8.

The court also found that the Fire Department had failed to tailor its affirmative action remedy to the only discrimination-related concern articulated by the Department—its concern to avoid the adverse impact of a rank-order use of its hiring test (Pet. App. 36a-40a). The court reasoned that the Fire Department had been "unimaginative in the extreme in seeking to avoid a regime of racial preferences," observing that the Fire Department had refused even to consider using tests employed by fire departments in other jurisdictions (*id.* at 38a-39a). It stated that the Department "could have exhausted the 1984 eligibility list" (*id.* at 39a), or "moved in the intervening years to validate the FST for rank-order use (as the experts at OPM thought had already been done as of 1979)" (*ibid.*). Or, it added, the Fire Department "could have ceased to use the test, especially since * * * the passing score was set at such a meek and lowly level that the exam results, at least in the lower strata, would seem virtually meaningless" (*ibid.*). The court thus concluded (*ibid.*) that the District's affirmative action plan violated Title VII and the Due Process Clause because, "even assuming *arguendo* that the District's hiring procedures constituted a 'violation' necessitating remedial action, its race-based hiring methods were not narrowly tailored to accomplish its remedial purposes."

Finally, the court addressed the question "why the District of Columbia would embark upon this course" and found the answer in "[the Fire Department's] effort to achieve a strict racial balance in its workforce in compliance with" D.C. Law 1-63 (D.C. Code Ann. § 1-507 (1987)) (Pet. App. 40a-41a). That statute requires every agency in the District of Columbia government to have, as a hiring goal, "full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the Dis-

trict of Columbia, including, but not limited to, Blacks, Whites, Spanish-speaking Americans, Native Americans, Asian Americans, females and males" (*id.* at 41a). The court concluded that "the statutory goal of a racially balanced workforce is not only an inadequate ground upon which to support the [affirmative action plan], * * * [it] is a ground that stands condemned by Title VII and the higher law of the Constitution" (*id.* at 43a).

5. On petition for rehearing, the divided panel ruled that the decision in *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), did not lead to a different result (Pet. App. 79a-123a). The court reasoned (*id.* at 82a-83a) that, in requiring affirmative action plans to be justified by the existence of a "manifest imbalance" reflecting underrepresentation in "traditionally segregated job categories," the Court in *Johnson* "was * * * clear in relating the existence of employment discrimination (and the goal of eliminating its effects) to the bedrock Congressional purposes informing Title VII" (*id.* at 83a). See also *id.* at 94a-95a. After noting that its decision was grounded solely on Title VII (*id.* at 86a),[4] the court reviewed the racial composition and hiring patterns of the Fire Department (*id.* at 86a-90a) and concluded that "there is no manifest imbalance in the District's Fire Department; indeed, there is manifestly no imbalance at all" (*id.* at 90a). Rather, the court said, "[i]t could hardly be plainer that

[4] The court elected not to resolve the issue, raised sua sponte by the court following oral argument on the rehearing petition, whether the United States has standing to challenge the constitutionality of the affirmative action plan. Accordingly, it declined to rule on the constitutional challenge to the plan (Pet. App. 84a-86a). Judge Silberman, while joining the opinion of Judge Starr for the court, concluded for himself that the United States does have such standing, and also concluded that the affirmative action plan is invalid on constitutional as well as Title VII grounds (*id.* at 98a-111a).

the District's Fire Department is not burdened with the clogged channels of opportunity that characterized the employment situation in *Johnson* * * *" (*id.* at 90a-91a). It then turned to the "tailoring" issue and noted that, whereas *Johnson* involved an affirmative action plan that set aside no specific numbers of positions for minorities or women and that merely authorized consideration of ethnicity or sex as one factor in evaluating qualified candidates, the Fire Department's plan used race as a "hard-core, cold-on-the-docks quota," and "nothing less" (*id.* at 91a-92a). For these reasons, the court concluded (*id.* at 94a-97a) that the decision in *Johnson* did not require a change in either the legal methodology employed by the panel majority or the conclusion it had thereby reached.

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. The Fire Department's affirmative action plan plainly does not seek to eliminate a "manifest imbalance" in a "traditionally segregated job category." While the Fire Department was segregated in the 1950s, an average of over 40% of those hired as firefighters by the Fire Department since 1969 have been black; and roughly 37% of the present employees of the Fire Department are black (Pet. App. 107a n.9 (Silberman, J., concurring)). Therefore, there is no basis for suggesting either that the entry-level firefighter position continues to be reserved for white employees, or that it is so perceived. Cf. *Steelworkers* v. *Weber*, 443 U.S. at 198 n.1; *Johnson* v. *Transportation Agency*, slip op. 15-16. Moreover, whether the firefighter position is correctly characterized as a "traditionally segregated job categor[y]" or not, there plainly was no im-

balance, must less a "manifest imbalance," in that job category at the time the Fire Department put this affirmative action plan into effect. The 37% black population within the Fire Department compares very favorably to the 29% black population in the greater Washington metropolitan area.[5] And while the Fire Department's applicant pool was about 74.53% black in 1980 and 64.6% black in 1984, the Fire Department hired on average at least 75% blacks for the firefighter positions that opened

---

[5] In originally concluding that a "manifest imbalance" existed, Judge Mikva argued in dissent below (Pet. App. 65a) that the 37% representation of blacks in the Fire Department should be compared to the working age population of the District of Columbia, which is 70% black. But, as the panel majority recognized (*id.* at 88a-90a, 107a & n.9), the Fire Department's past and present recruitment practices, which have successfully reached far outside of the District, indicate that the greater Washington metropolitan area is the far more accurate benchmark. See *Stone* v. *FCC*, 466 F.2d 316, 322 (D.C. Cir. 1972) (greater Washington SMSA data, not District data alone, is the proper benchmark for determining whether radio station discriminated in hiring). In any event, it does not appear that the definition of the most appropriate geographic market for statistical comparisons with respect to the hiring of firefighters for the District of Columbia raises a question worthy of review by this Court.

In his dissent to the denial of rehearing, Judge Mikva further suggested that (Pet. App. 118a) a "manifest * * * imbalance" existed between the percentage of blacks in the Fire Department and the percentage of blacks in the overall workforce of the District of Columbia government. Whether such an imbalance exists or not, this comparison is not legally relevant. The work force of the District of Columbia government is not the labor pool from which entry level employees of the Fire Department are drawn, and, therefore, comparisons of the racial compositions of the two work forces proves nothing about discrimination or imbalances in traditionally segregated job categories. See *United States* v. *Town of Cicero*, 786 F.2d 331, 335-337 (7th Cir. 1986) (Posner, J., concurring and dissenting).

up in all years after 1981.[6] Thus, the court below quite correctly held (Pet. App. 86a-91a) that there was no "manifest imbalance" in the firefighter position that could justifiably be corrected by a racial quota.[7]

---

[6] As Judge Silberman noted (Pet. App. 107a n.9), the suggestion of Judge Mikva (*id.* at 120a) and petitioner (Pet. 17) that a "manifest imbalance" may be found in the disparity between the representation of blacks in the work force (37%) and the representation of blacks in the 1984 applicant pool (64.6%) muddles "stock" and "flow" statistics. Indeed, under this reasoning, an employer can create an artificial justification for race-conscious action simply by increasing the flow of minority applicants through vigorous recruitment methods.

[7] Petitioners' off-handed suggestion (Pet. 11 n.5) that, in making this judgment, the court below improperly overturned the findings of fact by the district court is wrong. The district court decided this case on cross-motions for summary judgment based on stipulated facts. The district court was thus in no position to, and did not, make any findings of fact. Concomitantly, in reviewing the district court's judgment, the court of appeals was entitled—indeed, required—carefully to review the summary judgment record and to apply the law to that record.

Petitioners further err in suggesting (Pet. 17-18) that the decision below conflicts with *United States* v. *County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981). In that case, the Fourth Circuit held that statistics concerning representation of minorities in the greater metropolitan Washington area did not provide an appropriate benchmark for assessing whether Fairfax County's local government had engaged in discrimination. Nothing in that holding addresses, much less decides, whether such statistics provide an appropriate benchmark for assessing whether the District of Columbia government has engaged in discrimination—and there is no reason to assume that these labor markets are in fact symmetrical (and, indeed, common experience teaches that more suburban dwellers will work in the city than vice versa). In any event, the Fourth Circuit held only that the district court's judgment approving use of applicant flow figures in that case was not clearly erroneous; it did not hold that applicant flow figures must always be used.

2. Contrary to petitioners' assertion (Pet. 12-14), *Johnson* does not hold that race-conscious employment action may be taken in the absence of any predicate of past discrimination. On the contrary, the Court in *Johnson* said (slip op. 9-10) that its judgment "must be guided by [its] decision in [*Steelworkers* v.] *Weber*, [433 U.S. 193 (1979)]," which found that, where blacks have been historically excluded from a position, "taking race into account [is] consistent with Title VII's objective of 'break[ing] down old patterns of racial segregation and hierarchy' " (slip op. 10 (citation omitted)). The *Johnson* Court then determined (*id.* at 13, 14) that the affirmative action plan at issue there was prompted by "concerns similar to those of the employer in *Weber*"—specifically, the elimination of "the effects of employment discrimination." And while the Court said that an employer need not produce the evidence necessary to support a prima facie case of discrimination against itself (*id.* at 14), it reiterated (*id.* at 19) that the employer must produce evidence that its plan "satisfies the first requirement enunciated in *Weber*"—*i.e.*, that the plan aims to break down old and continuing patterns of racial segregation and hierarchy. *Johnson* thus reaffirms the requirement of prior, persisting exclusion or segregation as a necessary predicate to race-conscious employment action.

3. Petitioners similarly err in suggesting (Pet. 13-14) that, under *Johnson*, an employer may undertake race-conscious action without tailoring its remedial action to the manifest imbalance identified, including consideration of race-neutral alternatives. *Johnson* makes clear that an affirmative action plan must not "unnecessarily trammel[] the rights of male [or nonminority] employees or create[] an absolute bar to their advancement" (slip op. 19). In doing so, *Johnson* relies heavily on Justice Powell's opinion in *University of California Regents* v. *Bakke*, 438 U.S. 265

(1978), which expressly warns that race-conscious action is appropriate only where it is properly tailored to the nature of the problem it seeks to correct. And, as Justice Powell has explained elsewhere, any legitimate effort at tailoring of remedies requires a consideration of alternatives—including non-race based ones. See *Fullilove* v. *Klutznick*, 448 U.S. 448, 510-511 (1980) (Powell, J., concurring). That remedial action is voluntary should not and does not change the degree of care that the law requires of the employer.[8]

Here, the Fire Department did not even consider using nonracial means—such as recruitment through a cadet program, development of a valid test, or use of a physical agility requirement—to hire firefighters. Cf. *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 23 (plurality opinion) (normal remedies for employment discrimination are not race-conscious). Far from the situation in *Johnson* where sex was used as a "plus-factor" in choosing among closely competing candidates (see *Johnson* v. *Transportation Agency*, slip op. 18-19), here race was the *only* factor used, apart from the requirement of achieving an examination score equivalent to what can be achieved by random choice. Blind reliance on race fails *Johnson's* requirement that an employer using an affirmative action plan tailor its race-conscious action to ensure that the rights of nonminorities are not unnecessarily trammelled.

4. Petitioners appear to contend (Pet. 14-17) that the Fire Department's hiring quota was designed to "remedy"

---

[8] Petitioners' assertion (Pet. 14) that nonminority candidates have no "legitimate expectations" of being evaluated without regard to their race because the Fire Department has failed to develop a nondiscriminatory test is inconsistent in principle with this Court's decision in *Connecticut* v. *Teal*, 457 U.S. 440 (1982), and stands Title VII's nondiscrimination guarantee on its head.

an arguable disparate impact arising from the employment tests it has administered. But, with one minor exception,[9] the Fire Department never employed these tests as rank-ordering devices—precisely because it wanted to *increase* the representation of minorities in its ranks. See Pet. App. 8a. Thus, as petitioners themselves maintained throughout the administrative proceedings giving rise to this case (see *id.* at 5a), there is no basis for suggesting that a prior history of discrimination can be attributed to the use of these tests.[10] In any event, petitioners did not properly tailor their so-called remedial action to address their allegedly discriminatory tests. On the contrary, they simply adopted a bottom-line quota—providing that, in hiring firefighters, the Fire Department must hire a percentage of blacks equal to the percentage of blacks that passed their unvalidated examination—in order to achieve compliance with District of Columbia law. Such actions unlawfully discriminate against all individuals protected by Title VII—white and black. See *Connecticut* v. *Teal*, 457 U.S. 440 (1982); *Johnson* v. *Transportation Agency*, slip op. 18.

5. As petitioners note (Pet. 10), the affirmative action plan in issue here has expired and been superseded by a racially-neutral hiring plan that petitioners themselves have proposed and that the United States has accepted.[11]

---

[9] As to this exception, the Fire Department took immediate steps to remedy the effects of that action long before it proposed the affirmative action plan at issue in this case. See Pet. App. 33a n.29.

[10] By contrast, the courts have found marked animus against non-minorities and males in the upper levels of the Fire Department in recent years. See Pet. App. 105a, citing *Bishopp* v. *District of Columbia*, 788 F.2d 781, 786-789 (D.C. Cir. 1986); *Dougherty* v. *Barry*, 607 F. Supp. 1271, 1284 (D.D.C. 1985); *McCormick* v. *District of Columbia*, 554 F. Supp. 640 (D.D.C. 1982).

[11] Under the terms of the new plan, selection of entry-level firefighters will be made solely on the basis of a "cadet program,"

While this action does not moot the case, at least for the reason that claims for monetary relief may still turn upon it (see *Firefighters Local No. 1784* v. *Stotts*, 467 U.S. 561, 571 (1984)), it clearly diminishes any importance that the case might otherwise have had.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DAVID K. FLYNN
ROBERT J. DELAHUNTY
Attorneys

MAY 1988

---

until such time as the petitioners develop a valid, nondiscriminatory selection device. Selection apparently will also involve exhaustion of the 1984 eligibility list.

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60436